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In the

Supreme Court of the United States

DONALD H. RUMSFELD, et al.,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of neither party.[1]

Founded in 1973 and headquartered in Sacramento, California, Pacific Legal Foundation (PLF) is a nonprofit public interest law foundation with a commitment to First Amendment freedoms, such as are relevant to this case. In particular, this case involves interpretation and application of a landmark First Amendment ruling, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). PLF submitted friend of the court briefs in defense of the First Amendment rights in *Dale* as well as in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.C. 2002). PLF attorneys currently represent one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Ct. App. 2002), *rev. granted*, 65 P.3d 402 (Cal. Mar. 26, 2003) (No. S112621) (concerning a punitive city policy directed at the Evans petitioners because of their affiliation with the Boy Scouts of America).

PLF also supports robust enforcement of the unconstitutional conditions doctrine (one of the legal issues in the case at bar); PLF attorneys were counsel for petitioners in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), a milestone application of unconstitutional conditions analysis.

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF believes its public policy perspective and litigation experience in constitutional law will provide a helpful perspective in the resolution of this case.

SUMMARY OF ARGUMENT

The court below relied on *Boys Scouts of America v. Dale*, 530 U.S. 640 (2000), in concluding that the Solomon Amendment flouts the Constitution by forcing institutions of higher education to accommodate military recruitment even if they oppose United States military policies related to homosexuality.

Amicus offers no position on whether the ruling should be affirmed. Rather, Amicus files this brief to urge against any withdrawal or limitation of *Dale*. Limiting *Dale* is not necessary in order to uphold the decision below; likewise, limiting *Dale* is not required in order to overturn the decision below.

If this Court finds that the law school Respondents are private expressive organizations (like the Boy Scouts); that their tenets are subverted if they are forced to accommodate military recruiters; and that no compelling governmental interest supersedes expressive rights in this context, then *Dale* can be invoked to strike down, or limit, the Solomon Amendment.

On the other hand, fully upholding the Solomon Amendment would not require limiting *Dale*. *Dale* did not declare First Amendment associational and expressive rights to be absolute. This Court could rule against the law schools—and still show allegiance to *Dale*—if it found that the Solomon Amendment furthers a compelling interest in a narrowly tailored way.

Dale is one of the key civil rights decisions of the last 100 years, because it rejected the proposition that government may compel private expressive organizations to abandon their beliefs and belief-based organizational policies. Yet it still is

under assault—rhetorically, politically, and legally—by opponents of the liberties that it defends. Whatever the Court decides in this case, it can further a compelling *constitutional* interest by leaving *Dale* intact—and by reiterating *Dale*'s important role as a safeguard of First Amendment freedom.

ARGUMENT

I

THE COURT SHOULD REJECT ANY SUGGESTION THAT *DALE* BE ABANDONED OR LIMITED

The Solomon Amendment conditions federal funding to universities on their permitting military recruitment on campus—even at schools, such as Respondents, that claim their antidiscrimination policies are at odds with the military's refusal to allow acknowledged homosexuals to serve. In striking down this mandate—in declaring that the First Amendment protects Respondent law schools from the compulsion decreed by the Solomon Amendment—the court below invoked *Dale*.

Dale dealt with the First Amendment right of an expressive association not to be forced by government to abandon its organizational beliefs. This Court held that New Jersey ran "afoul of the Scouts' freedom of expressive association" by trying to dictate Boy Scout organizational policies in opposition to Scout convictions. 530 U.S. at 656. As the district court in *Till* distilled the teaching of *Dale*, "the Boy Scouts have a First Amendment right to freedom of expressive association, which includes the right to exclude homosexuals as members or leaders in the organization." 136 F. Supp. 2d at 1308.

The court below declared that the Solomon Act's coercion of Respondents is as unconstitutional as New Jersey's coercion of the Boy Scouts: "[J]ust as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout oath', the

law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness." *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 232 (3d Cir. 2004).

There are critics of *Dale* who have voiced the hope that this Court's review of *Rumsfeld* might possibly lead to *Dale* being limited, or even abandoned. For instance, writing in the online commentary service, Slate, Stanford Law School Professor Richard Thompson Ford criticizes both *Dale* and the Solomon Amendment, and says he'd "love to see them both go; forced to choose, I hope the court will spare Solomon and ditch *Dale*." Richard Thompson Ford, *But the Scouts, Your Honor*, Slate, May 6, 2005, *available at* http://slate.msn.com/id/2118217.

However, whether this Court upholds the ruling below or reverses it, it may—and it should—do so without disturbing *Dale*.

A. The Decision Below May Be Reversed Without Weakening *Dale*

The elements for a claim that First Amendment rights of expressive association have been violated are three:

> (1) [W]hether the group is an "expressive association," (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association.

Rumsfeld, 390 F.3d at 231 (citing *Dale*, 530 U.S. at 648-58).

The court below found that the law school Respondents are "expressive associations" because they satisfy the test of engaging in "some form of public or private expression above

a *de minimis* threshold." *Id.* (citing *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000)).

The court below also found the second prong of the *Dale* test satisfied: The Solomon Amendment, according to the court, "significantly affects the law schools' ability to express their viewpoint" opposing discrimination in hiring, by compelling them to host, and to expend their resources to accommodate, a "discriminatory" employer, namely the United States military. *Rumsfeld*, 390 F.3d at 231-32. Here, the court followed *Dale*'s precept that "deference" should be given "to an association's view of what would impair its expression." *Id.* at 233 (citing *Dale*, 530 U.S. at 640).

Third, the court below found that the Solomon Amendment does not represent a narrowly tailored means of advancing a compelling governmental interest, because the "military has ample resources to recruit through alternative means . . . that do not require the assistance of law school space or personnel." *Rumsfeld*, 390 F.3d at 235.

Dale, then, was found to be on all fours with the case at hand. By definition, affirming the ruling would not require any departure from *Dale*. Amicus wishes to stress that the same would hold for *reversing* the ruling: It could be done without retrenching on *Dale* in any way. Amicus does not urge either reversal or an affirmance, only that this Court issue its decision without altering *Dale*—and, indeed, preferably take the occasion to restate *Dale*'s importance and precedential value.

To reverse the ruling below without doing violence to *Dale*, would require focusing on the third *Dale* element—whether a compelling governmental interest supersedes the First Amendment claims in this context. As for the first two elements, the court below defined and applied them in a way that is entirely consistent with *Dale*, so to challenge the decision on those points would risk revising, and narrowing, *Dale*.

1. This Court Should Not Define "Expressive Organization" in a Restrictive Way

Dale applied an expansive approach to identifying an expressive organization and expressive activity. The Court did not question in any way the Boy Scouts' status as a private organization or an expressive organization. The general rule that the Court recognized has broadly inclusive implications: In order to qualify as an expressive organization, a group merely "must engage in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648.

Accordingly, the court below was able to agree with the law school Respondents that they are expressive organizations —because their antidiscrimination policies put forward a viewpoint—and to defer to the law school Respondents' determination of what regulatory restrictions curtail their expressive rights. *Rumsfeld*, 390 F.3d at 231-35.

Insisting on a narrower framework as to what constitutes a private expressive organization would not just depart from *Dale*'s example, it would have the effect of narrowing the private domain in our society and expanding the sphere of the public and governmentally regulated domain. In contrast, recognizing and according First Amendment rights to "a full range of civil associations"—as *Dale*'s precedent instructs—leads to a "larger role for civil associations vis-a-vis government in creating social norms," so that the shape and direction of society evolves spontaneously through citizens' free-will choices and decisions rather than through top-down bureaucratic dictate. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 534 (2002).

2. This Court Should Not Depart from *Dale*'s Deference Toward Expressive Organizations in Identifying Their Beliefs and Threats to Those Beliefs

Dale recognized a similarly deferential standard for identifying an expressive organization's beliefs and what regulations might threaten them. With regard to the Boy Scouts' claims as to what they officially believe on issues of sexual morality— claims that had been contested by the New Jersey Supreme Court when it ruled against the Scouts—this Court said, simply, "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression" on the issue. *Dale*, 530 U.S. at 651. "[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.*

The court below showed similar deference to the law-school Respondents. Showing less deference to private organizations as to what their animating beliefs are and how they might be infringed through regulatory overreach, would subvert the freedom-enhancing effect of *Dale*. Is *Dale*'s rule—that the expressive organization should be allowed to articulate its own message and identify governmental threats to it—too permissive? No, answers Professor Kmiec:

> The dangers of government censorship, of interference with the right of individual citizens within their chosen intermediate associations to work through the difficulties or moral or political questions, is too sensitive and too important to allow a more demanding standard of proof [from the private organization]. The freedom of expression and association is the individual's, after all, not the government's.

Symposium, *The Supreme Court's Most Extraordinary Term*, 28 Pepp. L. Rev. 667, 668 (2001).

3. This Court Should Confine Its Scrutiny to the "Compelling State Interest" Issue

Reversing the ruling below on the third prong of the *Dale* test would not subvert *Dale*, because *Dale* propounds no rules, relevant in this context, as to what governmental interest is compelling enough to outweigh the First Amendment rights at issue. If the Court were to find that military recruitment constitutes a compelling interest—and that requiring law schools to cooperate is narrowly tailored to serve that interest—then the ruling could be reversed without *Dale* being scaled back. Amicus offers no opinion on whether the Solomon Amendment appropriately serves such an interest; Amicus stresses only that it is this question—the compelling interest question—that must be the focus if this case is to be adjudicated without undermining *Dale*.

B. As a Seminal Civil Rights Decision, *Dale* Should Be Scrupulously Respected, Whichever Way This Case Is Decided

This Court not only *can* decide the case at bar without disturbing *Dale* (whether the ruling below is affirmed or rejected), it *should* render its decision in a way that leaves *Dale*'s principles and holding intact. This is because *Dale* is one of the seminal civil rights decisions of the last 100 years; it secures fundamental freedoms by rejecting the ominous idea that government may compel private expressive organizations to abandon or attenuate their beliefs. If the Boy Scouts had been forced to adopt government-scripted policies that the Scouts believed would water down their organizational commitments, the implications for expressive organizations across the philosophical spectrum would have been chilling. Writing in a pre-*Dale* case, California Supreme Court Justice Kennard articulated the peril: If the right of expressive

association is denied the Scouts, "[c]ould the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?" *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring).

"*Dale* can be understood as protecting the autonomy of civil society from the state." McGinnis, *supra*, at 533. "By granting . . . substantial space for a private organization to exclude individuals whose mere presence is antithetical to their expressive norms, the Court turned the First Amendment into a powerful tool for private articulation of social norms." *Id.*

Dale powerfully buttresses a Tocquevillian conception of society. The tendency to associate for purposes of social uplift, or instruction or advocacy, was cited by Tocqueville as an especially healthy aspect of American society—a bulwark of liberty, in fact. "Americans of all ages, all stations in life, and all types of disposition are forever forming associations," he wrote. Alexis de Tocqueville, *Democracy in America* 485 (J.P. Mayer & Max Lerner Eds., 1966).

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England

> some territorial magnate, in the United States you are sure to find an association.

Id. at 485.

Tocqueville regarded the associational impulse not just as a social benefit, but also as a force for freedom, protecting against the "omnipotence" of the majority and serving as a "dike to hold back tyranny of whatever sort." *Id.* at 177.

By insisting on a bright line of demarcation between the public sector and the private sector, and ensuring constitutional protection of private expressive organizations against encroachments by the state, *Dale* represents perhaps this Court's most significant contribution to "the conditions [necessary] for local and private processes to work"—in other words, for the engines of freedom to flourish. McGinnis, *supra*, at 570. *Dale* itself must therefore be nurtured and protected with the same jealousy applied to other great civil rights rulings.

C. The Court Should Take This Opportunity to Reaffirm *Dale*, Which Is Under Assault from Ideologically Motivated Bureaucrats and Interest Groups

While a decision can be rendered either way in this case without disturbing *Dale*, that does not mean *Dale* should be ignored here. To the contrary, the opportunity should be seized to reaffirm *Dale*'s central place in this Court's jurisprudence.

This is because *Dale* is under attack.

1. Government Entities in Various Parts of the Country Have Attempted to Undermine *Dale* by Punishing the Exercise of the Rights That *Dale* Safeguards

A number of ideologically motivated government entities, in various parts of the country, have attempted or are presently attempting to subvert it. Some examples:

- Soon after *Dale* was issued, the school board of Broward County, Florida, voted to bar the local Boy Scouts from further use of school facilities after hours—while continuing to allow other private groups to meet on school premises. Relying on *Dale*, the district court issued a preliminary injunction, holding that the School Board could not "punish [the Scouts] for [the Scouts'] own message." *Till*, 136 F. Supp. 2d at 1308. Citing *Dale* for the principle that the Scouts have a First Amendment right to their beliefs, the court informed the school district that it could not retaliate against the Scouts on account of those beliefs. *Id.*

- In June, 2001, the District of Columbia Human Rights Commission demanded that the local Scouts readmit two men as adult members who had been dismissed because they were acknowledged homosexuals. *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d at 1195-97. The District of Columbia Court of Appeals reversed, pointing out that the Commission's action could not "be reconciled with *Dale*." *Id.* at 1200.

- In August, 2002, the city council of Ann Arbor, Michigan, voted, in effect, to punish the Boy Scouts for the viewpoints that *Dale* protects; the city withdrew from United Way participation, because of the Scouts' leader-selection policies. Subsequently, Washtenaw United Way officials voted to stop directing any United Way funds to the Boy Scouts, and the city responded by rejoining the United Way's fund-raising campaign. *See* Maryanne George, *Ann Arbor, United Way*

reunite; Group alters Scout tie over its ban on gays, Detroit Free Press, Mar. 6, 2002, at 3B, *available at* 2002 WLNR 7592919.

- In November, 2002, a California court of appeal upheld a Berkeley city action that excludes the Berkeley Sea Scouts from a free berthing program for nonprofits at the Berkeley Marina. The exclusion is imposed because Berkeley officials consider the Boy Scouts a "discriminatory" organization due to their assertion of the rights recognized by *Dale*. *See Evans*, 127 Cal. Rptr. 2d at 696. The California Supreme Court has granted review. Pacific Legal Foundation attorneys represent one of the petitioners challenging Berkeley's financial punishment of the Sea Scouts as a violation of First Amendment and Equal Protection rights. *Id.* at 703-05.

- In July, 2003, a federal district court in San Diego ruled that the city's lease of park property to the Boy Scouts violates the federal Establishment Clause, because the Scouts' core principles—protected by *Dale*—include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). This anti-Scout ruling has been appealed to the Ninth Circuit.

2. The Court Below Correctly Held That Conditioning Public Benefits on Surrender of First Amendment Rights is Unconstitutional; This Court Should Affirm That Finding

Notably, one of the prime tactics in the governmental assaults on the Scouts—and on *Dale*—involves threats to exclude the Scouts from generally available public programs, benefits, or facilities if they do not abandon the constitutional rights guaranteed by *Dale*. This amounts to unconstitutional conditions being imposed on an expressive organization. In this case, the court below recognized that such *indirect* assaults on a constitutional freedom are as impermissible (absent a

compelling governmental interest and narrow tailoring) as a *direct* assault—i.e., an outright prohibition—on exercise of the constitutional right. *Rumsfeld*, 390 F.3d at 243. The court found a violation where government "*conditions funding* on the law schools' propagation" of expression that contradicts their asserted viewpoints. *Id.* (emphasis added). Even if this Court were to overturn the ruling below—by finding the Solomon Amendment to be a narrowly tailored way to serve a compelling interest—it should not criticize, *but rather should endorse*, the articulation below of the doctrine of unconstitutional conditions, not least because that doctrine safeguards *Dale* from subversion by ideologically inspired bureaucrats.

"The unconstitutional conditions doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that would otherwise be available." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 796 (2d ed. 2002) (citations omitted).

In *Nollan v. California Coastal Comm'n*, 483 U.S. at 834, this Court affirmed the petitioners' right not to have private property taken by the state without the compensation guaranteed by the Fifth Amendment.

In holding that the Coastal Commission acted unconstitutionally when it refused to issue a building permit to the Nollans unless they agreed to grant an unrelated public easement on their property, *Nollan* employed the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2087 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

Just as conditioning a generally available benefit on the relinquishment of rights is prohibited in the realm of the Fifth Amendment, so it is barred (absent narrow tailoring and a compelling governmental interest) as a device to undermine First Amendment freedoms. Indeed, the principle that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests is "especially" true where "his interest [is] in freedom of speech." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (citation omitted). *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny [tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) ("[S]pecial consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.").

This Court has consistently held that a group may not be excluded on the basis of its views or expressive identity from a publicly provided benefit for which it otherwise qualifies. *E.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 268 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972).

Because the protection of the *Dale* precedent is so important—and because *Dale* is under assault through strategies involving unconstitutional conditions—the Court should take the opportunity afforded by this case to reiterate the vitality of the unconstitutional conditions doctrine in the First Amendment context.

CONCLUSION

For the reasons stated above, Amicus respectfully urges that, however the Court rules on the merits of this case, it reaches its decision in a way that protects and respects *Dale* as the important civil rights precedent that it is.

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Respectfully submitted,

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